"But whether the smut points to crime or not, there can be no doubt that it does degenerate taste and debauch the truth."[5]

Even assuming this result, the state can claim no legitimate interest in matters of taste; and hence, its entry in that area is unauthorized.

The statute at bar carries with it also the fallacious assumption that obscenity is so obvious as to obviate analysis; and such was the interpretation placed upon it by the learned Court below. But in *Isenstadt v. Commonwealth*,[6] the Massachusetts Supreme Judicial Court, holding Lillian Smith's book, "Strange Fruit," to be obscene, went on to contrast it with George Elliot's "Adam Bede," whose theme, the Court observed, "is handled with power and realism without obscenity . . . . (and is) universally recognized as an English classic."

Yet, "Adam Bede" was once called "the vile outpourings of a lewd woman's mind."[7]

It would appear, in fact, that some books—the so-called "classics" for example—have acquired an "immunity" from legislative bonfires notwithstanding the obscenity of some of their content.[8] This is attributable either to their age, and/or general public acceptance.[9]

---

[5] *Ibid.*, p. 147; from an article introduced into the record by the witness which appeared in the October, 1952, issue of Readers Digest, by Margaret Culkin Banning.

[6] 318 Mass. 543, 556.

[7] See:

Commonwealth v. Gordon, supra, p. 116.

[8] See, for example:

United States v. Levine (C. C. A. 2, 1936), 83 F. 2d 156, 157.

[9] Of course, censored books never achieve an acceptance, and so cannot be classified in this category.

But can it be seriously argued that sexual stimulation is somehow precluded by the historic importance of the work, or the artfulness of its prose? Obviously not; and yet, it is unthinkable that the book should be destroyed on that account. On the other hand, the "Canterbury Tales," "De Cameron," "Lady Chatterly's Lover," or "An American Tragedy," cannot be defended by a logic which measures the value of each book by the purity of thought instilled in the mind of its reader. The only test, therefore, which can justify the "classics" is one which leaves that, and other literature untouched by emotion or prejudice.

The point to be gained from all this is that sex discussion, however written, cannot be treated as a sort of static immorality, likened to crimes of murder, rape and overt lewdness. The difference between shocking words spoken in public, in the presence of a "captive" audience, and shocking words appearing in print, under the eye of a voluntary reader, is a distinction which suffers from too frequent oversight. Speech of the former type is, in effect, conduct uttered by the speaker with notice that its immediate effect will offend the sensibilities of others; whereas, the reader is shocked because he wants to be; or, if accidental, his embarrassment is private, short-lived, and of no great moment. Hence:

> "It cannot be a present danger unless its reader closes it, lays it aside, and transmutes its erotic allurement into overt action. That such action must inevitably follow as a direct consequence of reading the book does not bear analysis, nor is it borne out by general human experience." (*Commonwealth v. Gordon* (1949), 66 D. & C. 101, 153.)

In the last analysis, the legislature has, by virtue of the statute at bar, thrust upon the judiciary the onerous

duty of serving as literary critic for the community. There are few judges who care for this responsibility; and even fewer who are equipped with the skill required by that position.

Besides, as Judge Bok so poignantly concludes:

> "The criminal law is not, in my opinion, the '*custos morum* of the King's subjects,' as *Regina v. Hicklin* states: it is only the custodian of the peace and good order that free men and women need for the shaping of their common destiny."[10]

Conclusion.

Amicus respectfully submits that the statute at bar not only poses a federal question, but one of vast importance to the communities having similar laws, and to the freedom of speech involved thereby. The appeal from the decision of the Court below should be granted.

Respectfully submitted,

A. L. WIRIN,
HUGH R. MANES,
Counsel, American Civil Liberties Union, Southern California Branch, Amicus Curiae.

---

[10] *Commonwealth v. Gordon, supra*, 66 D. C. 101, 156.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
MAR 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

On Appeal From Appellate Department, Superior Court, in and for the County of Los Angeles, State of California.

Brief of American Civil Liberties Union, Southern California Branch, as Amicus Curiae in Support of Appeal.

A. L. WIRIN,
257 South Spring Street,
Los Angeles 12, California,
HUGH R. MANES,
510 South Spring Street,
Los Angeles 12, California,
Counsel, American Civil Liberties Union, Southern California Branch, Amicus Curiae.

IN THE

Supreme Court of the United States

October Term, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Appellee.

PETITION FOR REHEARING.

STANLEY FLEISHMAN,
1741 Ivar Avenue,
Hollywood 28, California,
Attorney for Appellant.

WILLIAM B. MURRISH,
SAM ROSENWEIN,
Of Counsel.

SUBJECT INDEX

PAGE

Argument 4

The statute at bar proscribes literature without reference to the overt behavior of the reader, and is thereby, on its face, and as construed and applied, violative of the First and Fourteenth Amendments to the Federal Constitution 4

Conclusion 10

TABLE OF AUTHORITIES CITED

Cases	Page
Bridges v. California, 314 U. S. 252	6
Chaplinsky v. New Hampshire, 315 U. S. 568	4, 6
Commonwealth v. Gordon, 66 D. & C. 101	7, 8, 9, 10
DeJonge v. Oregon, 299 U. S. 366	6
Hague v. C. I. O., 307 U. S. 496	6
Isenstadt v. Commonwealth, 318 Mass. 543	8
Kovacs v. Cooper, 336 U. S. 77	4
Musser v. Utah, 333 U. S. 95	6
People v. Wepple, 78 Cal. App. 2d Supp. 959	5
Thornhill v. Alabama, 310 U. S. 88	6
United States v. Levine, 83 F. 2d 156	8
United States v. One Book Entitled "Ulysses," 5 Fed. Supp. 182, 72 F. 2d 705	7
West Virginia Board of Education v. Barnette, 319 U. S. 624	5
Whitney v. California, 274 U. S. 357	5
Winters v. New York, 333 U. S. 507	4, 5

Miscellaneous	
Hearings, Select Committee on Current Pornographic Materials, H. R., 82d Cong., 2d Sess., p. 152	7

Statutes	
California Penal Code, Sec. 311, Subds. 3, 4	4
United States Constitution, First Amendment	3, 4, 6
United States Constitution, Fourteenth Amendment	4

Textbook	
20 Law and Contemporary Problems, pp. 587, 590-598, Lockhart and McClure, Obscenity in the Courts	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

On Appeal From Appellate Department, Superior Court, in and for the County of Los Angeles, State of California.

Brief of American Civil Liberties Union, Southern California Branch, as Amicus Curiae in Support of Appeal.

The American Civil Liberties Union, Southern California Branch, by and through its counsel, respectfully appears and files its brief as *Amicus Curiae* in the above entitled cause. Consent therefor has been given and stipulated to by the parties hereto, and is on file herein. *Amicus* also appeared, with leave of the Court below, as *amicus* in the Appellate Department of the Los Angeles Superior Court.

TOPICAL INDEX

PAGE

I.

Appellant had available substantial grounds which the court mistakenly considered were not presented. Constitutional questions of great importance were thus presented and not considered or disposed of by the court 1

A. The court mistakenly stated that no issue was presented concerning the obscenity of the material involved 1

B. The court apparently assumed, mistakenly, that appellant was not presenting his procedural due process point arising out of the failure of the State court to specify which books were obscene and therefore the underlying basis of appellant's conviction 4

II.

The standard for identifying obscenity approved by the court as meeting constitutional objections is different from the standard under which appellant stands convicted. Appellant thus stands convicted of a charge not made 6

III.

The court's opinion does not treat or consider the serious constitutional question of censorship under an unconfined standard of "obscenity" whether cast as "tending to corrupt or deprave" or "appealing to prurient interest" 10

Conclusion 13

Counsel for petitioner are familiar with the arguments presented by the parties hereto, and believe that there is a need for further argument upon one of the points advanced by appellant.

Petitioner is dedicated to the support and preservation of the civil liberties of all persons, irrespective of status, politics, origin or the nature of the crime charged. Petitioner subscribes to the principle that free speech and opinion are the most vital of our civil liberties, in that these guarantee a dynamic democracy and a responsive government. But if speech and belief are to serve this function, it is essential that they be left free of restraint, save that minimal amount necessary to preserve ordered liberty.

The statute at bar proscribes obscene literature by punishing those who write, publish and disseminate it. As construed by California Courts, this statute condemns sex discussion if, in the opinion of the judge or jury, it tends to arouse lasvicious thoughts and lustful desires. The menace of such a law is obvious for it allows a trier of fact to enter the private domain of the conscience in order to purify what is found there. Freedom of speech and press is indivisible; and the State may not delimit that freedom save when the words spoken are a call to action, and there is no time for reply. If a State cannot circumscribe ideas because unpopular or unwise, it cannot reach erotic thoughts either. In the first place, there is nothing unlawful about them, particularly when inchoate, and secondly, governmental interference with

TABLE OF AUTHORITIES CITED

CASES	PAGE
Cline v. Frink Dairy Co., 274 U. S. 445	8
Cole v. Arkansas, 333 U. S. 196	8, 9
Commonwealth v. Gordon, 66 D. & D. 101	8
De Jonge v. Oregon, 299 U. S. 353	8, 9
Dennis v. United States, 341 U. S. 494	9
Donaldson v. Reed Magazines, Inc., 333 U. S. 178	12
Herndon v. Lowry, 301 U. S. 242	3
Holmby Productions, Inc. v. Vaughn, 350 U. S. 870	11
International Harvester Co. v. Kentucky, 234 U. S. 216	8
Lanzetta v. New Jersey, 306 U. S. 451	8
People v. Wepplo, 78 Cal. App. 2d (Supp.) 956, 178 P. 2d 853	6
Rescue Army v. Municipal Court of the City of Los Angeles, 331 U. S. 549	5
Stromberg v. California, 283 U. S. 359	9
United States v. Alpers, 338 U. S. 680	12
West Virginia State Board of Education v. Barnett, 319 U. S. 624	11
Winters v. New York, 333 U. S. 507	11

STATUTES	
California Penal Code, Sec. 311	2, 13
Rules of the United States Supreme Court, Rule 58(2)	5
United States Constitution, First Amendment	12

the communication of ideas cannot depend on their content. Either the State has the power to restrict all ideas, or it is without power to restrict any. *Amicus* adheres to the latter view, and respectfully submits that the broad sweep of obscenity statutes such as that at bar is fatal to their validity. The case at bar is of great national importance, as well as of paramount interest to *amicus*, because it stakes out the furthermost limits of State power in the First Amendment area. Those limits appear not to have been established by this Court heretofore. For these reasons, *amicus* respectfully appears as *amicus curiae* in support of appellant's appeal.

We take no position as to the guilt or innocence of the defendant.

IN THE

Supreme Court of the United States

October Term, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Appellee.

PETITION FOR REHEARING.

David S. Alberts, appellant, presents this petition for a rehearing and in support thereof respectively shows:

I.

Appellant Had Available Substantial Grounds Which the Court Mistakenly Considered Were Not Presented. Constitutional Questions of Great Importance Were Thus Presented and Not Considered or Disposed of by the Court.

A. The Court Mistakenly Stated That No Issue Was Presented Concerning the Obscenity of the Material Involved.

In making the ruling that no issue was presented concerning the obscenity of the material involved, this Court failed to pass upon or rule on appellant's claim that the statute here was unconstitutional as applied to him. Appellant did urge that the statute was unconstitutional on

ARGUMENT.

The Statute at Bar Proscribes Literature Without Reference to the Overt Behavior of the Reader, and Is Thereby, on Its Face, and as Construed and Applied, Violative of the First and Fourteenth Amendments to the Federal Constitution.

The statute at bar[1] punishes, *inter alia*, the writing publication and dissemination of any obscene or indecent literature, and "any notice or advertisement" of such material. Appellant was convicted of violating both sections of said statute, and the conviction was sustained on appeal by the Appellate Department of the Los Angeles County Superior Court, that Court being in the instant case the Court of last resort.

It is axiomatic that the Democratic process rests upon the unencumbered exchange of ideas and opinions among all persons. And the First Amendment is designed to safeguard the channels of communications and all such speech and literature, except that which incites to unlawful action (see: *Chaplinsky v. New Hampshire*, 315 U. S. 568), or obviously offends the sensibilities and rights of others (see: *Kovacs v. Cooper*, 336 U. S. 77). Moreover, the Fourteenth Amendment enjoins the State from obstruction access to the marketplace of ideas to the same extent that the First Amendment precludes Congress from doing so (see: *Winters v. New York*, 333 U. S. 507, 509). Freedom of expression and press is not limited, of course, to the espousal of that which is approved by a legislative majority; but, within the narrow limits aforesaid, the constitutional protection extends to all speech, irrespective of the wisdom or validity of what is said (see: *West*

---

[1]California Penal Code, Section 311, Subdivisions 3 and 4.

its face and therefore the Court need not go further, but appellant also urged that the statute, as applied to *the books herein* (the only material passed upon by the Court below) was also invalid.

In its opinion (S. O.[1] 3, fn. 8) the Court said:

> "No issue is presented in either case concerning the obscenity of the material involved."

In this the Court was seriously mistaken. Throughout the proceedings appellant urged that California Penal Code, Section 311, upon its face and as construed *and applied* violated appellant's constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution. The point was raised in the "Questions Presented" in the Jurisdictional Statement (J. S. 4)[2] and in the brief for appellant (App. Br. 7).[3] Unlike appellant in No. 107, appellant here never conceded that his material was obscene.

> "There is, however, no concession here that the writings which resulted in the conviction of appellant were 'obscene and indecent' as defined by the Court below. The appellant continues to assert that all the literature used at the trial against him was protected from governmental interdiction by the provisions of the First and Fourteenth Amendments." (App. Br. 31, fn. 6.)

> "Indeed, the conviction here may well rest upon books clearly protected from governmental abridgement by the Constitution in any view." (App. Br. 71, fn. 24.)

---

[1]We thus refer to Slip Opinion.

[2]We thus refer to the Jurisdictional Statement.

[3]We thus refer to Appellant's Brief.

Virginia Board of Education v. Barnette, 319 U. S. 624). For if opinion have any truth in it, its value is manifest; whereas, if the opinion is false, then it may yet serve as a monument to the wisdom and rationality of that which has been accepted.

This is not to say, however, that only such speech which communicates ideas is prohibited, because, as this Court stated in *Winters v. New York, supra*, at page 510, "The line between the informing and the entertaining is too elusive for the protection of that basic right.". And even if the line were ascertainable, common sense would dictate that entertaining speech could not be restricted without endangering opinion of more social value.

The test of permissible speech, therefore, is not whether it contains hated or offensive thoughts, but whether there is time to reply to it (concurring opinion of Mr. Justice Brandeis in *Whitney v. California* (1926), 274 U. S. 357, 377). Such a test not only acknowledges the validity of the judgment of the governed, but it also concedes the fallibility of the censor.

The statute at bar is one which cannot stand in the light cast by these principles. For one thing, it is not narrowly drawn; is not limited to publications which induce action—lawful or unlawful—but proscribes speech which merely arouses thoughts or ideas. If this is not evident from the face of the provisions at bar, it is certainly so by the construction placed upon it by California Courts of last resort, as would appear thusly:

> " . . . A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires'. . . ." (*People v. Wepple* (1947), 78 Cal. App. 2d Supp. 959, 961.)

Finally, virtually all of Point III of appellant's reply brief (App. Rep. Br. 16-20)[1] was devoted to this issue. As we there pointed out, the Appellate Department based its affirmance upon books, and books alone (App. Rep. Br. 17-19). We argued:

> "The matter comes down to about six books which appellee maintains are 'very obscene'. Space does not permit extended comment upon these books, but appellant submits that a reading of each of these writings will indicate (1) that it is simply irrational to urge that anyone should know these books arouse 'lascivious thoughts' in a reader to the extent of corrupting and depraving him; (2) that these books are scientific and literary material protected fully from suppression by the fundamental law; (3) that the ideas contained in these works are important and should be known and considered by those who wish to know and consider them; and (4) that by designating these works as 'pornography' and 'obscenity' the appellee has made crystal clear the vagueness and limitless scope of the statute here involved." (App. Rep. Br. 19.)

If the books which form the basis of appellant's conviction are in truth not obscene, his conviction is contrary to the command of the Fourteenth Amendment. Where, as here, appellant claims that the Act under which he was convicted is unconstitutional on its face, as construed, *and as applied*, it is this Court's duty to "inquire whether the statute as applied in the trial denied appellant rights safeguarded by the Fourteenth Amendment." (*Herndon v. Lowry*, 301 U. S. 242, 247, 254, 259-260.)

---

[1] We thus refer to Appellant's Reply Brief.

Government has a legitimate interest in the public health, safety and welfare, and an undoubted power to guard against evils jeopardizing these areas of its concern (*Musser v. Utah* (1947), 333 U. S. 95; *Chaplinsky v. New Hampshire* (1942), 315 U. S. 568). But it has no authority to proscribe literature merely on account of the thoughts—lustful or otherwise—which it may evoke in the reader (*cf. Thornhill v. Alabama* (1940), 310 U. S. 88). In the first place, there is nothing unlawful about such thoughts; secondly, there is no evidence that they will lead to action; and thirdly, if impure thoughts are sufficiently aroused as to incite to action, there is no indication that the resultant conduct will be unlawful.

Plainly, the State can have no legitimate interest in the thinking processes of its citizens (*cf. Thornhill v. Alabama, supra; Hague v. C. I. O.* (1938), 307 U. S. 496; *DeJonge v. Oregon* (1936), 299 U. S. 366). Nor is it enough to burn books and punish the publishers thereof, because of an alleged *tendency* of such literature to result in undesirable conduct (*Bridges v. California* (1941), 314 U. S. 252, 273). State action in First Amendment areas can be justified only if there is an immediate and serious causal relation between an erotic literary passage and the reader's overt behavior upon reading it. If the evil is said to be that the book incites a breach of the peace, then it is fair to demand that the statute at bar establish this—rather than mere thought—as the indictable offense.

But the vice of obscenity statutes like the one before the Court lies not only in the unconstitutionality of its objectives, but in the error of its assumptions. Here, citizens are deprived of the opportunity of formulating their individual opinions of what literature is suitable for

B. The Court Apparently Assumed, Mistakenly, That Appellant Was Not Presenting His Procedural Due Process Point Arising Out of the Failure of the State Court to Specify Which Books Were Obscene and Therefore the Underlying Basis of Appellant's Conviction.

With all due deference to the intimation of Mr. Chief Justice Warren at oral argument that the above point was not before the Court, we submit, respectfully, that the point was presented and urged throughout the proceedings (J. S. 4, 5-8; 23-24; App. Br. 7, 12, 71, fn. 24; App. Rep. Br. 17-19; Further Memorandum Submitted By Leave of Court 43), and appears in fair statement on page 71 of Appellant's Brief:

> "The procedural vice is exemplified in this case. The books were introduced in evidence in groups, and each group given different exhibit numbers. (For a description of the books and their exhibit numbers see Statement of the Case, *supra*.) After ruling out certain exhibits as 'not kept for sale', the trial judge found Exhibits 9 and 11 to be obscene, although 'the court has not read all these books.' [R. 88] Exhibits 1 and 5 were held not obscene [R. 88]. On appeal, appellant argued that Exhibits 9 and 11 had not been proved to be kept for sale. Respondent argued that Exhibit 5, which the trial judge had absolved, should be held obscene by the appellate court and was a sufficient basis for affirmance. The appellate court's only reply was: . . . that some of his books were obscene we do not consider debatable.' [R. 21] Appellant does not know now which 'obscene books led to the affirmance of his conviction, or which books he may sell without

consumption; and yet, are given no assurance that the censor's judgment will be infallible. For ten years, New York readers were deprived of reading James Joyce's "Ulysses," because a state Court had ruled it obscene[2]; until finally a Federal District Court in New York declared otherwise (*United States v. One Book Entitled "Ulysses"*, (S. D. N. Y., 1933), 5 Fed. Supp. 182, 72 F. 2d 705).

More importantly, however, is that such legislative interference with individual reading habits occurs at the very market place of ideas: the library and the book shop. And it does so in the absence of evidence that the community—or the individual—is overtly affected by what it reads,[3] or that the time to meet the threat by other means has run out.

The frank implication of obscenity statutes is that community judgment is untrustworthy in such matters. Indeed there is more than mere speculation in this assumption.[4] There is, however, a paucity of evidence to support this paternalism, or even the view that what is read incites to crime. As a matter of fact, at least one "expert" witness argued:

---

[2]See:

Commonwealth v. Gordon (194), 66 D. & C. 101, 114.

[3]See:

Lockhart and McClure, *Obscenity in the Courts*, 20 Law and Contemporary Problems, 587, at pp. 590-598.

[4]As one expert witness who appeared before the Gathings Committee put it:

"There are neighborhoods where you will find very many more of the (obscene literature) displayed in cities than in others, *and the unfortunate thing is that [such materials] are usually displayed in neighborhoods which need some moral protection.*" (Emphasis supplied.) (Hearings, Select Committee on Current Pornographic Materials, H. R., 82d Cong., 2d Sess., Dec. 3, 1952, at p. 152.)

subjecting himself to a second prosecution.[5] (*Cf.*, De Jonge v. Oregon, 299 U. S. 353, 362; Cole v. Arkansas, 333 U. S. 196.) Indeed, the conviction here may well rest upon books clearly protected from governmental abridgement by the Constitution in any view. (*Cf.*, Stromberg v. California, 283 U. S. 359.)"

Finally, if there is any question as to the manner of presentation of the issue appellant respectfully suggests that Rule 58(2) contemplates rehearing in such a situation because of the great public interest in seeing that constitutional questions are correctly decided.

The simple fact is that nobody knows even today after affirmance by this Court which of appellants' books offend the law. As a minimum the case should be returned to the State Court for clarification so that "the underlying constitutional issues" may be presented to this Court "in clean-cut and concrete form." (*Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U. S. 549, 584.)

---

[5]As part of the sentence appellant was placed on two years probation, a condition of which was that he should not have in his possession any obscene material. Will he be violating the probation order if he has in his possession "The Picture of Conjugal Love", Exhibit 5, written in the Seventeenth Century? Must *all* of appellant's books be destroyed as obscene pursuant to the trial court's order [R. 5]?